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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 541

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

vs.

H. N. BORDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinions Below

Borden agrees with Local 100 as to previous opinions in this cause.

Jurisdiction

Borden agrees to the jurisdiction of this Court.

Question Presented

The question presented by the union in the Petition for Writ of Certiorari was:

"Does a state court have jurisdiction to award compensatory and punitive damages against a labor union for its refusal to issue a job referral to a member, which refusal resulted in denial of employment by an employer whose operations affect interstate commerce? Is such conduct by a labor union 'potentially subject to the exclusive federal regulatory scheme' expressed in the Labor Management Relations Act of 1947, and thus limited to the exclusive jurisdiction of federal tribunals under the Federal Act?"

Bordon would respectfully differ and submit that the true question presented is:

Where the action of a labor union, not a certified bargaining agent, in willfully and maliciously denying a member of the union his right to work and labor in violation of the union's Constitution and By-Laws and established rules and procedures, state right to work laws and the union member's inherent right to work is accompanied by threats of expulsion and bodily harm and abusive cursing:

1. Does a state court have jurisdiction of a suit by the union member for breach of contract and in tort for actual and punitive damages and damages for mental pain and suffering?

2. Is such conduct by the labor union subject to the exclusive jurisdiction of the National Labor Relations Board under the Labor Management Relations Act of 1947, as amended?

Statutes Involved

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*), are

set forth in Appendix, *infra*, pages 41-46. The relevant provisions of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401, *et seq.*), are set forth in Appendix, *infra*, pp. 47-48.

The provisions of Article 5207a, Tex. Rev. Civ. Stat., Article 5154 and 5154g, Tex. Rev. Civ. Stat. are set forth in Appendix, *infra*, pages 48-49.

Statement

This is not a wrongful hiring hall or an injunction case. Borden's action sounds both in contract and in tort.[1] The Texas Courts accepted jurisdiction and awarded damages for actual loss and punitive damages for Local 100's violation of the contract between the parties and the willful and malicious breach of Borden's common law inherent right to labor and earn money and his rights as set forth in Article 5207a, Revised Civil Statutes of Texas.

A.

Pleadings in the State Court

Borden brought suit against Local 100 and the United Association and in his First Amended Original Petition (R. 16) and his Trial Amendment (R. 57) alleged that he is a member of Local 100 and its parent international union. It is alleged that he was entitled to present his paid up dues book to Local 100 and become a member in good standing and that, on or about September 15, 1953, he did present same to Cleo Lanham, Business Manager of Local 100, who wrongfully refused to accept it; that he was entitled to and did present his clearance card to Lanham and become

[1] As shown by opinion of the Court of Civil Appeals of Texas (R. 350).

a member of Local 100 and that Lanham wrongfully refused to accept same until October 9, 1953.

He alleges that he was offered a job by Farwell Construction Co. and was entitled to be referred by Local 100 to said job; that Lanham cursed and abused him and refused to refer him to the job; that all of the actions of Lanham were wrongful, willful and malicious; and that Lanham was the authorized agent of Local 100 and his conduct was known to and ratified by said Local and The United Association (parent union).

Borden alleges that the conduct of Lanham violated his contract rights under the Constitutions and By-Laws of Local 100 and United Association and thus constituted a breach of contract; and that Lanham's actions tortiously deprived him of his inherent right to labor and earn his livelihood. That he had no effective remedy through the unions and that he was subjected to threats of bodily harm to his person and of expulsion from the union, and pursuit of any supposed internal remedies would be futile and illusory.

Borden asked for compensatory damages, damages for mental pain and suffering caused by acts of Local 100 and United Association and punitive damages for the malicious and wrongful conduct.

Local 100 challenged the state court's jurisdiction on the basis that the subject matter of the suit was pre-empted by the Labor Management Relations Act of 1947.

B.

STATE COURT DISPOSITION OF PLEAS AND TRIAL ON THE MERITS

The trial court, District Court of Dallas County, Texas, at a preliminary hearing sustained the union's pleas to the jurisdiction of the state court and its further plea that a

member of an association cannot bring suit against his own association (R. 16). The Court of Civil Appeals of Texas at first affirmed the trial court on both pleas (R. 61) and then, before the judgment was final, withdrew the opinion and entered its opinion dated July 25, 1958, reversing the trial court remanding the cause for trial on the merits (R. 22).

The Supreme Court of Texas then granted Writ of Error on the question of whether a member of a union may sue his own union. The unions did not apply for writ of error on the jurisdictional question. That court, in its opinion, affirmed the Court of Civil Appeals and remanded the case for trial on the merits. 160 Tex. 203; 328 SW 2d 739 (R. 26-48).

The case was tried before a regular 12 man jury and the trial court dismissed the United Association.[2] The case as to Local 100 was submitted to the jury on special issues. The jury, in answer to the issues contained in the Court's charge, found that Borden was promised a job on the Republic Bank Building by Farwell Construction Company;[3] that at the time Farwell asked for Borden he was available for work;[4] that Local 100, acting through Lanham, willfully refused to let Borden work on the job;[5] that Lanham knew under the rules of Local 100 that Borden was entitled to work on the job;[6] that Local 100 approved Lanham's con-

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[2] The trial court granted the International's Motion for Instructed Verdict after presentment of the case but before submission to the jury, such Motion being granted solely due to a lack of evidence on which to submit special issues to the jury as to that Defendant.

[3] Special Issue No. 1 (R. 62).

[4] Special Issue No. 1 (R. 62-63).

[5] Special Issue No. 5 (R. 63).

[6] Special Issue No. 6 (R. 64).

duct;[7] that Borden suffered actual damages in the amount of $1,916.00;[8] that Borden suffered mental anguish[9] and was awarded damages in the amount of $1,500.00 for mental pain and suffering;[10] and he was awarded $5,000.00 as punitive damages;[11] and that it would have been useless for Borden to pursue his complaint within the union.[12]

Local 100 is in error in its Brief (p. 6) when it states that the jury found against Borden's claim on denial of his membership rights. Special Issue No. 3 is predicated on Special Issue No. 2 and inquires as to whether Local 100 refused to accept Borden's clearance card after the "call" was placed to Local 100 by Farwell's foreman for Borden.[13]

The trial court judgment (R. 60-72) disallowed the $1,500.00 awarded Borden for mental anguish (R. 71) and ordered a remittitur of the punitive damages in excess of the actual damages, thus allowing actual and punitive damages in the amount of $3,832.00 (R. 71).

The Court of Civil Appeals affirmed the judgment of the trial court, 355 SW 2d 729 (R. 348-360) overruling the points of error of both Local 100 and Borden.

Local 100 then applied for writ of error to the Supreme Court of Texas on the sole basis that the jurisdiction of the

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[7] Special Issue No. 8 (R. 64).

[8] $1,916.00 being the difference between the jury's answers to Special Issues Nos. 9 and 10 as allowed by the Court (R. 64-65).

[9] Special Issue No. 11 (R. 65).

[10] Special Issue No. 13 (R. 66).

[11] Special Issue No. 14 (R. 66).

[12] Special Issue No. 22 (R. 68).

[13] Special Issue No. 3 is not limited as to time except by Special Issue No. 2 (when Thurman placed a call for Borden). The jury could by its answer have found that Borden had been refused clearance but his clearance card accepted prior to the "call" by Thurman. In any event Borden's claim of denial of union rights is not based on this special issue since it is admitted that he was a member of Local 100 and that his clearance card had been accepted on October 9, 1953 (R. 12).

state courts was pre-empted (R. 36). The United States Supreme Court granted certiorari on December 17, 1962 (R. 362).

C.

Facts

Local 100 is the Dallas based local plumbing union of the international union, United Association of Journeymen and Apprentices, etc. The Local had a membership of approximately 800 men in 1954 (R. 24). Borden is a member of both the local and international unions and at time of trial in 1960 was 63 years of age.

Members of one local of the United Association have an unqualified right, if in good standing, to transfer to any other member local of the Association.[14] A local union must accept a member of a sister local upon his presentment of a clearance card,[15] a paid-up Dues Book or a deposit of $10.00 as a guaranty of good faith.[16]

Borden arrived in Dallas, Texas, in mid-September, 1953, and called Mr. Jack Heath, Job Superintendent for Farwell Construction Company on the Republic National Bank construction project (R. 80). Farwell was already acquainted with the quality of his work (R. 79). The next day he presented his union dues book to Cleo Lanham, the Business Manager of Local 100. Lanham told him:

> "Yes, I have had a call on you. You are not going to work" (R. 83).

> "You are not going to work down there on the bank job or for Farwell, you have come in here wrong, you have come in here with a job in your pocket" (R. 84).

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[14] Sections 154-162, Plf's Ex. No. 7 (R. 339-341).
[15] Section 158, Plf's Ex. No. 7 (R. 339-340).
[16] Sections 160, 161, Plf's Ex. No. 7 (R. 341).

The next day Lanham told him that he would not go to work on the bank project as long as he (Lanham) was manager of the Union and that the best thing Borden could do would be to leave town (R. 85).

After trying unsuccessfully for four days to be admitted to Local 100 and commence work Borden went to Shreveport, La., to get his clearance card (R. 94-95). Upon returning to Dallas he attempted for approximately two days to present his clearance card to the Union and was rebuffed (R. 97-98), until he found Lanham in a cafe on the third day (R. 98). At that time Lanham reluctantly accepted the clearance card, cursed Borden and said:

> "That don't mean you are going to work by no means" (R. 99).

Borden then called A. G. Thurman, foreman on the construction project, informing him that he had placed his clearance card with the Union and asked if he still had a job opening. Thurman told him that he still had a place for him, whereupon Borden asked that he place a "call" for him (R. 145). Thurman called Lanham at the Union and asked that Borden be sent to the bank project if they gave him a referral (R. 145). Lanham then told Thurman:

> "I am not about to send that old son of a bitch down there, he shoved his card down our throat and I am not about to send him to the bank" (R. 145).

Borden never did go to the project and ask for a job from Farwell (R. 106). He did continually request of the Union employment on the bank job (R. 100). Work continued unabated on the bank during the period from September 15, 1953 to September 15, 1954 (R. 148).

When a man was called for by name by a contractor, it is undisputed that it was the uniform practice of Local 100

to send that particular man. This practice had been in effect at least for eleven (11) years (R. 223, 226).

Borden complained of his wrongful treatment to Fred Zuefeldt, business agent of Local 100, and numerous others (R. 101) as well as John Galvin, Lanham's successor (R. 227). The membership of Local 100 was informed of the actions taken against Borden, by a reading of the Executive Board minutes, at a general meeting in October, 1953 (R. 218). A meeting of the Executive Board was convened in October, 1953, to consider Borden's complaint (R. 316). At this meeting Borden was told to quit complaining about the treatment he had received from the Union or they would expel him from the Union and kick him out of Dallas (R. 131). The minutes of the Executive Board meetings of Local 100 were subpoenaed for the trial but, interestingly enough, were lost while in the possession of Zuefeldt, the business agent.

The threats against Borden at the Executive Board meeting made him fear bodily harm (R. 131). He became nervous and upset after the action taken against him by Local 100 in 1953 (R. 268).

Petitioner bases its case on an erroneous assumption that the record reveals only four possible reasons for the Union action in refusing to allow Borden to work on the bank job (Brief for Petitioner, pp. 9, 19). Reasoning by the method of residues is always fallacious if all alternatives are not considered. Thurman's testimony furnishes another reason. Lanham told him that Borden was not going to work on the bank because "he shoved his card down our throat" (p. 145). Thus, the reason was because Borden was trying to exercise his union rights. Lanham could also have meant that at 57 years of age Borden was too old. The Executive Board minutes were lost and Lanham never even admitted that he had received a call for Borden or there might have

been other reasons. Whatever the reason, it was found by a qualified jury to be wrongful under the rules of Local 100 and the action based thereon was judged by a court competent in tort and contract law to be willful and malicious.

The Mechanical Contractors Association of Dallas, Inc., of which Farwell was a member, executed a Member Only Agreement with Local 100 in June, 1953 (Plf's Ex. No. 8, R. 273), which was in effect through September 15, 1954. This was not an exclusive bargaining contract nor was Local 100 the certified bargaining agent for the employees of Farwell. There was no contractual agreement between the Union and Farwell for the maintenance of a hiring hall and Borden does not complain of any illegal hiring hall system or actions of Farwell. Borden was never employed, nor his employment terminated, by Farwell; and he never requested that Farwell employ him without a referral (R. 106).

This case does not test the power of states to regulate hiring halls as Petitioner contends (Brief of Petitioner, p. 11); it does exhibit the power of a state court to enforce the contract rights of a member against his Union and award damages for a malicious and willful tort committed against a member by his union.

Summary of Argument

I.

This Action Does Not Come Within the Terms of the Federal Act

A. This action was brought in the District Court of Dallas County, Texas, a court of general jurisdiction, for breach of contract and for tort action resulting in damages. The suit was not cast in allegations which would intentionally or accidentally come within the terms of the Federal Act. It is based on state law and, indeed, has been found to be both a breach of contract and a tort violation by the Texas courts. The Union breached its contract with Borden in that it maliciously and willfully deprived him of the subject matter of the contract, that is, aid and assistance in securing and retaining favorable employment. The Union also, through malicious and abusive threats of bodily harm, caused Borden to be deprived of his common law right to labor and earn money by the employment of his craft skills.

B. Section 7 of the Act guarantees certain rights to employees. These rights are concerned with labor organization and concerted activities. The conduct of the Union in this case does not involve either. The union was not a certified bargaining agent and no such relationship is in issue, nor any rights thereunder.

No violation of Section 8 of the Federal Act is involved. There was no motive on the part of the Union, either expressed or implied, to encourage or discourage Borden's membership in the Union. He was already a member of the Union and continues to be so. Complaint is made of threats to terminate his Union membership on the basis of malicious acts condoned and ratified by the entire Union membership.

No attempt was made to cause a prospective employer to discriminate against Borden for the purpose of encouraging or discouraging union membership. The prospective employer was not a party to the suit nor was it involved in any way. Actions which would not have the effect of encouraging or discouraging union membership could not in any wise cause such a result, unless unintentionally and then it would be of no consequence. Such an inference would be the merest speculation based on nothing more than the existence of a union and a member.

Therefore, the basis of Borden's action here concerns subject matter not legislated upon by Congress, either in the protected or the prohibited field under the Act, but cognizable under state law.

II.

This Action Does Not Involve Matters Which Are Exclusively Under the Federal Act

A. A contractual relationship existed between Borden, a union member, and Petitioner, the Union. Therefore, the two parties were competent to contract and did so contract upon a lawful subject matter. The union breached the contract, as determined by a jury upon special issues, by wrongfully, maliciously and intentionally refusing to send Borden to a job of work which was open and available to him. Borden either had to secure approval of the union for work or be in direct violation of the Constitution and By-Laws of the union, thus risking expulsion from the union, and thereby being deprived of an important right, an asset to his earning his livelihood. Indeed, the executive officers of the union, with the approval of the members, did, in fact, make a direct threat of expulsion and bodily harm to Borden when he complained of the union conduct.

It is admittedly clear that Congress did not intend to legislate with regard to private contract rights between a union member and his union. It is clear also that Congress did not, therefore, enact any legislation or establish any forum concerning the violation of such contract rights.

B. State courts asserted jurisdiction under state laws and granted compensatory damages for violation of individual rights constituting a tort. This is such a case, albeit arising out of contract rights. Congress did not intend by the passage of the Labor Management Relations Act to deprive state courts of tort jurisdiction. The jurisdiction of state courts in tort actions has been emphasized and re-emphasized by this court in many decisions.

Absent state court tort jurisdiction, no effective and real remedy is available to an individual for breach of his rights to labor and earn his money by the practice of his skill and craft. There has never been any intent on the part of Congress as expressed in the Act, nor any disposition on the part of this Court, to offer immunity or isolation to any labor organization from the consequences of its tortious and wrongful acts toward its members.

C. The Court has always been quick to deny state jurisdiction in cases of actual or potential conflict with the central scheme of the Labor Management Relations Act. The Court has been equally quick to refuse to interfere with state court jurisdiction on matters which are not central to the administration of the Act, i.e., neither protected nor prohibited activities.

The correction of wrongs done to an individual by means of breach of contract or tort violation are not within the aegis of the stated purposes of the Act, i.e., to lessen strife in labor management relations in industries affected with

interstate commerce. These wrongs are real and substantial to an individual and cry out for correction, but as concerns the purposes of the Act, are no more than peripheral.

III.

Examination of Gonzales and Garmon in Light of Labor Management Disclosure Act of 1959

The sweep of Federal law based on Congressional intent should not be determined by wooden logic based on the mere fact that parties to start court actions are incidentally involved in the labor movement. The law is reasonable, if nothing else. The reasonable construction of *Garmon*, especially in view of expressed Congressional intent in the Labor Management Disclosure Act of 1959, compels a conclusion that for a case to be *arguably* within the jurisdiction of the NLRB to the exclusion of state jurisdiction, it must be *reasonably* arguable in light of expressed Congressional intent; not just plain arguable as a matter of self-interest motivation limited only by the ingenuity of counsel.

It is not the intent of Congress to delegate to the NLRB the initial decision of application of remedies in cases of purely tort and contract law under state jurisdiction, especially where important individual rights which demand vindication are concerned and more especially where, to decide otherwise, requires a strained and artificial construction. The Court has emphasized in a long line of cases that it does not propose to tolerate wrong or injustice committed against an individual under any theory of isolation or immunity because the parties happen to be involved in the labor movement, *a fortiori* when no overwhelming matter of national concern is involved.

ARGUMENT

I

This Action Does Not Come Within the Terms of the Federal Act.

A. Borden's Action Is Based on State Law, Not Federal Law.

It is submitted that Petitioner has erroneously characterized Borden's cause of action. This is not a suit to regulate labor-management relations in general or, specifically, between Local 100 and Farwell. No change is sought in the hiring policies of Farwell nor is that company a party to the suit. Borden was never hired or fired by Farwell and indeed he never sought employment from that company without union referral. This is not a case involving picketing or injunction or any other protected concerted activities.

This is an action under state law sounding both in contract and in tort. It is not based upon violation of the Labor Management Relations Act nor have any allegations been made as to violation of such Act. The substance of the action is concerned exclusively with state law, not federal law. The action is for damages caused by the union's breach of contract and its tortious interference with Borden's right to work. Because of the willful and malicious nature of the union's conduct and the abusive threats made to Borden that put him in fear of bodily harm and caused him to be nervous and upset, punitive damages as well as damages for mental pain and suffering were sought from the union.

Borden complains of discriminatory conduct in the sense that he was singled out for abuse, threats and loss of rights, but the discrimination alleged and proved was not such as

covered by the Taft-Hartley Act. Borden alleged an implied contract between the union and its members, and particularly between the union and Borden, that it would not discriminate unfairly or unjustly between the members.[17] As the Court succinctly set out in *Radio Officers* v. *Labor Board*, 347 U.S. 17, when speaking of the discrimination prohibited by Sec. 8(a)(3) (347 U.S. at p. 43):

> "Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

That Congress intended only such effect is clear from the wording of the Act, 29 U.S.C. §141, *et seq.*; at §148, which reads insofar as pertinent:

> "Section 8(b). It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . .
>
> Section 8(a). It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."

B. The Union Conduct Is Neither Protected Nor Prohibited by the Federal Act.

It is important to note that there is absolutely no evidence in the record concerning any agreement or communication between Farwell and the Union except the conversation between Thurman and Lanham (R. 145). The absence of action by the union for the purpose of causing Farwell to

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[17] Plaintiff's First Amended Original Petition, paragraph XV (R. 10 at p. 14).

discriminate against Borden is apparent. The action of the union in refusing to refer Borden was unilateral. No showing is made as to any effect on Farwell.

Material to this point is the lack of any collective bargaining agreement between the union and Farwell, establishing the union as the certified bargaining representative of all employees. *Radio Officers*, as well as the other cases relied upon by Petitioner to establish an unfair labor practice as to this case are inapposite. In each of the following cases the union was the exclusive bargaining agent for all of the employees of the respective employers. The importance of the presence or absence of this material fact is emphasized in *Radio Officers*, where there was a collective bargaining agreement and the union caused the employer to discharge the employee already hired because, under the contract, the employer could not accept the employee without proper clearance; in *Teamsters* v. *Labor Board*, 347 U.S. 17 (a companion case to *Radio Officers*) the union was the exclusive bargaining agent under a contract which gave the union control over the seniority system, and the union security provision in the contract had not been validated as provided by Sec. 8(a)(3). The union reduced an employee on the seniority list wrongfully causing the employer to discriminate; in *Gaynor* v. *Labor Board*, 347 U.S. 17 (another companion case to *Radio Officers*) the union was the exclusive bargaining agent for all employees and caused the employer to make a disparate wage payment to the union members in preference to non-union members; in *Miranda Fuel Co.*, 140 NLRB No. 7 (December 21, 1962), the union, as exclusive bargaining agent, caused the employer to reduce an employee's seniority contrary to the terms of the bargaining agreement; in *NLRB* v. *Federal Iron Works*, 211 Fed. 2d 927 (C.A. 3) the union as exclusive bargaining agent, executed, maintained and enforced an

illegal union security provision by causing the employer to recant and refuse to hire Fink, after his prior acceptance and hire; in *NLRB* v. *Local 340, Electrical Workers*, 301 F.2d 824 (C.A. 9), the employer, by the collective bargaining contract, hired only through the union hiring hall and consequently the employer refused to hire Wood because of union action in not referring. In *NLRB* v. *Local 1423, Carpenters*, 238 F.2d 832 (C.A. 5), it is not shown whether or not the union was the exclusive bargaining agent, and the case can offer Local 100 little comfort. There the employer had already hired three men and transported them some 400 miles to the job site and then, because of the union's threat to strike, was forced to release the men. In *NLRB* v. *Local 100, Plumbers*, 291 F.2d 927, enforcing 128 NLRB 398, the union was not the certified bargaining agent of all of the employees of the employer, but the Board found that Breland had been hired by Beard (employer) and then, because of union action, the employment was terminated and found further that the union action consisted not only of failure to refer but also of a threat by the union job steward to the employer when requesting that the employer not hire Breland.

The courts and Board then have found a Sec. 8(b)(2) violation where the unions by virtue of a collective bargaining contract have exercised rights over the hiring and firing policies of the employer. The exception to this rule being where the union by threats of strike, force and violence, etc. has intimidated an employer to cause him to discriminate against an employee. *Hod Carriers Union*, 134 NLRB No. 72 (Supplemental Decision, November 22, 1961).

Local 100, although it shows no employer action, attempts to bring Borden under the rationale of *Radio Officers* by inferring that Borden had violated a union rule and was being disciplined. There was no pleading or proof by

Local 100 that it had committed a wrong against Borden coming within the prohibitions of 28 U.S.C. §141 *et seq.;* at §158, Sec. 8(a)(1) or Sec. 8(b)(2). On the contrary, the union has heretofore contended, until the filing of its Motion for Rehearing in the Texas Court of Civil Appeals,[18] that no "call" had been placed for Borden by Farwell and that he was treated equally with all other union members.

We could engage in surmise, supposition and pettifoggery with Local 100 as to why Borden was not referred to Farwell but, regardless of surmise and supposition, the material facts show this to be a case involving neither protected nor prohibited activities under the Act. Also, whatever the reason for the union's action, the abuse, cursing, threats, etc. found by the state courts to be tortious and in breach of contract, certainly cannot be characterized as "a mere caprice". The union did not request any action of Farwell; it did not threaten action against Farwell; nor did it cause Farwell to dismiss or fail to hire Borden. The record shows that Borden was never employed, dismissed or refused employment by Farwell. He never requested employment directly of Farwell, nor asked that he be employed without referral (R. 106).

We are aware of no cause decided either by the Labor Board or the Court where a union has been found guilty of an unfair labor practice unless it caused or made an overt attempt to cause the employer to take action in discharging or refusing to hire. The plain wording of Sec. 8(b)(2) of the Federal Act decrees that an unfair labor practice is committed by a union only when it causes or attempts to cause an employer to violate Sec. 8(a)(3) by discriminating for the purpose of encouraging or discour-

[18] The Motion for Rehearing in the Texas Court of Civil Appeals is not included in the printed record but is on file in the Supreme Court.

aging union membership. In the absence of a union right or supposed right of control under a collective bargaining agreement enforced against the employer by a certified bargaining agent, or threat by a union against the employer, in either event causing employer discrimination to encourage or discourage union membership, there is no Sec. 8 (b)(2) violation. In *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667-675, the court reaffirmed its holding in *Radio Officers* v. *NLRB*, 347 U.S. 17 at page 43 that in an employer violation of Sec. 8(a)(3):

> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test."

It cannot be inferred that, because Farwell requested Borden to obtain a referral from the union, Farwell was guilty of discrimination to which the Act is directed. An illegal purpose or motive on the part of Farwell must be shown in order to say that any action taken by it was illegal discrimination. *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667 at page 675; *Radio Officers* v. *NLRB*, 347 U.S. 17. The holding of the court in *Local 357* repudiates speculation and surmise as engaged in by Local 100. This is particularly true when, as here, the union has not threatened Farwell and, indeed, has not even requested that it not employ. Here there was no certified bargaining agent or hiring hall agreement. Farwell was free to hire its employees through the union or outside of it.[19] Under the union's theory of Sec. 8(b)(2) and Sec. 8(b)(1), a refusal to refer by and of itself is an unfair labor practice. It would be no more illogical under this theory to say that the union has violated the Act as to all other union members not referred to a particular job. To argue that, by mere refusal to refer, a

[19] Although Thurman did testify that he customarily hired through union referrals (R. 214).

violation of Sec. 8(b)(2) or 8(b)(1) is committed is to engage in reasoning dismissed by this Court in *Local 357* where it was conceded that the mere existence of a union probably encourages union membership although such encouragement by itself is not banned by the Act.

The union makes no contention that a protected activity is involved. There being involved neither a protected nor a prohibited activity within the Act, jurisdiction resides in the state court. *International Union, United Automobile Workers, etc.* v. *Wisconsin Employment Relations Board*, 351 U.S. 266.

II.

This Action Does Not Involve Matters Which Are Exclusively Under the Federal Act.

A. Jurisdiction of the State Court to Enforce Contracts.

Assuming the action of the union to be an unfair labor practice, an assumption vigorously denied by Borden, Texas courts have jurisdiction to enforce contract rights between a union and a member of that union or between any other two parties competent to contract regarding a valid or lawful subject matter.

It is admitted that Borden was a member of the United Association (International Union) and Local 100. The constitution and by-laws of a union constitute a contract between the member and the union, *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, *House of Lords in Bonsor* v. *Musicians' Union* (1956 A.P.C. 104), and this contractual concept prevails in *International Printing, Pressmen and Assistants' Union* v. *Smith* (Supreme Court of Texas, 1947), 198 SW 2d 729.

Borden notified Farwell that he was in Dallas and inquired as to job availability and was requested to obtain a referral through Local 100 (R. 144). A call for Borden was then placed with the Union (R. 145). The practice of Local 100 was to refer the man requested by the employer (R. 223, 226). The jury found, in answer to Special Issue No. 1, that Farwell had promised Borden a job (R. 62); in answer to Special Issue No. 2, that Borden was available to work on the job (R. 62, 63); and in answer to Special Issue No. 5, that Local 100 refused to allow Borden to work on the job (R. 63); and in answer to Special Issue No. 6 that, under the rules of Local 100, Borden was entitled to work on the job (R. 64). The pertinent provision of the Constitution of the United Association is:

> Traveling Members to Report to Local Officers.
>
> Sec. 171. "Any member of the United Association accepting employment under the jurisdiction of sister Locals before reporting to the proper officer of such Local Union and depositing his clearance card, informing him of his intention of accepting employment under the jurisdiction of said union, shall be assessed a sum not to exceed $25.00" (Plf's Ex. No. 7; R. 332 at 342).

And pertinent provisions of the Constitution and By-Laws of Local 100 are:

> By-Laws, Article I.
>
> Sec. 30. "Members shall not solicit work from any contractor or their representative. All employment must be procured through Business Office of Local Union No. 100. Violation of this section subject to assessment of not less than five dollars ($5.00). Job Stewards, Foremen or Superintendents not reporting

these violations will be subject to an assessment of not less than five dollars ($5.00)."

Sec. 31. "Continued failure to comply with the Constitution and By-Laws of this Local Union shall render its members liable to suspension or expulsion, as three-fourths members may decide at any meeting" (Plf's Ex. No. 6; R. 324 at 329).

Sec. 34. "Any member who shall violate any of the laws of this Local . . . shall be subject to an assessment not less than $25.00 or expulsion" (Plf's Ex. No. 6; R. 324 at 330).

Borden, not being referred to the bank job under the provisions of the By-Laws of the Union, could not accept the job directly from Farwell since to do so would have been in violation of Section 30, Article I of the By-Laws. Acceptance of the job by Borden without obtaining the employment through Local 100 would have subjected him to disciplinary action, including expulsion, under Section 31. That this action was contemplated by the union is evidenced in the Executive Board meeting of the union convened to discuss Borden's complaint (R. 131). Borden chose to abide by the plain wording of the By-Laws and did not request the job from Farwell without union sanction (R. 106).

Borden, in joining the unions, agreed to be bound by the Constitution and By-Laws and Rules and Regulations thereof. By becoming a member he accepted certain duties and obligations and the unions, on the other hand, also accepted duties and obligations to him. Implicit in the contract is the implied agreement by the union to deal fairly and equally with the members. By joining the unions Borden was not agreeing to subject himself to arbitrary, willful and malicious wrongs such as here committed by the

union. Acceptance of the job by Borden in this case would have subjected him to internal disciplinary action by the union, including expulsion. Whether or not the union would have committed an unfair labor practice by seeking Borden's discharge after he had been employed is not in issue and, indeed, any consideration of this possible action would be rank speculation. That the union would have expelled Borden is not speculative but was, in fact, expressed by its Executive Board to be the intention of the union (R. 131). Had this complete severance taken place it could hardly be argued that state jurisdiction would not lie for Borden's reinstatement and damages for breach of contract. *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

The union then is saying that Borden should have taken the job with Farwell without union referral so that, after he had been expelled from the union, he could bring his action in the state court. To impose such a burden on the right to judicial relief would be to invite flagellantism of the worst kind.

The crux of the union's contention is that a suit to enforce internal union rights by contract after expulsion differs from the situation here at hand. It is submitted that this interpretation of *Gonzales* is too narrow and restricted and was not intended by this Court in that decision. By expulsion in the *Gonzales* case, Gonzales lost his right to be referred to jobs by the union equally with other members. His suit, along with reinstatement, sought damages for his inability to secure work and the refusal of the union to refer. No distinction could be drawn between that case and an identical case based upon damages for loss of rights through wrongful suspension. In either of these events the member has lost his valuable union rights, the only distinction being possibly that the suspension would

not be permanent. Borden sees his situation in no different light. He has been denied wrongfully, maliciously and arbitrarily, his valuable union rights, i.e., to be referred to the bank job as was the practice of the union, by the simple expedient of refusing to issue a job referral sending him to the job site. In any of these situations: expulsion, suspension, simple refusal to refer (observe union rights), the result is the same. The member has lost his valuable union right to be treated equally and fairly in accordance with the rules and practices of the union. To draw a distinction in such a case is to torture the ruling in *Gonzales*.

In *Gonzales*, when considering an action in contract in the state court, this Court said:

> "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by Federal law and indeed the assertion of any such power has been expressly denied. The provision to 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein'. . . ."

Thus it is recognized that the Act does not purport to regulate internal union affairs. In actions brought for the enforcement of such union rights jurisdiction of the State Courts has not been displaced. The Court also observed in *Gonzales* that the action was between the union and a member of the union and that Gonzales did not complain of the actions of any employers in refusing to employ him as the result of the termination of his union membership, and in this vein the Court stated (356 U.S. 617 at 622, 623):

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring

about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice in §8(b)(2). . . . The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms. Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A.B.A.J., 415, 483."

This holding by the Court is particularly appropriate. Borden does not complain of any action of the union directed at Farwell. His suit in contract looks solely to the action of the union against him. The state court proceeding, as is seen by Special Issue No. 6 (R. 64) inquired into whether Borden was entitled to work on the bank project under the rules of Local 100.

We would also show that the distinguished Amicus Curiae, Mr. J. Albert Woll, has heretofore recognized the right of a union member to bring suit against his union in contract in state courts. When addressing himself to Title I of the Labor Management Disclosure Act, 29 U.S.C. §411-415, he stated:

"Organized labor has not the slightest quarrel with the notion that union members should be accorded the basic rights set forth in the 'Bill of Rights'. Indeed, union constitutions, enforceable in state courts under traditional contract law principles, invariably contain such rights in one form or other." (J. Albert Woll, *Labor's "Bill of Rights": Symposium on the Labor-Management Reporting and Disclosure Act of 1959*, Ralph Slovenko, Editor.)

B. State Court Has Jurisdiction of Tort Action.

Again assuming, for purposes of argument only, that the union has committed an unfair labor practice, the jurisdiction of a state court has not been displaced by the Labor Management Relations Act of 1947. This Court has previously upheld such state court jurisdiction in *Allen-Bradley Local No. 111, United Electrical Workers of America Employment Relations* v. *Wisconsin Employment Relations Board*, 315 U.S. 740; *United Construction Workers, Affiliated with United Mine Workers of America, et al.* v. *Laburnum Construction Co.*, 347 U.S. 656; and *United Automobile Workers* v. *Russell*, 356 U.S. 634.

While the court found exclusive jurisdiction under the Federal Act in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, pre-empting state jurisdiction of a tort action, that case is not pertinent to the situation at hand. In *Garmon* the state had declared through a state labor act the action of the union engaging in peaceful picketing to be a tort. Certainly a state may not, either before or after the passage of the Federal Act, interfere with the central purposes of the Federal law. To allow state interference in such an instance would be tantamount to destruction of the existence of a federal government and its laws.

Texas has passed no labor-management act on which Borden relies. His action is based on the Texas Right to Work Law (Article 5207a, Revised Civil Statutes of Texas) specifically allowed by Sec. 14(b) of the Labor Management Disclosure Act of 1959, and common law tort and contract principles. This Court had this identical question before it in the *Laburnum* case, wherein at the outset the Court, in stating the union's position, there said (at p. 663):

". . . that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here."

The Labor Management Relations Act established the NLRB primarily for the purpose of forestalling unfair labor practices and the theme of the Act is preventive. The Court took cognizance of the purpose of the Act in answering the argument that state legal responsibilities of unions had not been displaced in *Laburnum*, where it held (at p. 666):

"The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct."

The holding has support in the Congressional history of the Act. Senate Report No. 105, 80th Cong., 1st Sess. 50, concerning S. 1126, after speaking of committee hearings concerning union coercion, threats of reprisals and mass picketing and violence, said in part:

"Some of these acts are illegal under state law, but we see no reason why they should not *also* constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act." (Emphasis added.)

Later the Court had a more identical question before it in the *Russell* case where, in setting out the question, the Court said (at p. 635):

"The issue before us is whether a state court, in 1952, had jurisdiction to entertain an action by an employee,

> who worked in an industry affecting interstate commerce, against a Union and its agent, for malicious interference with such employee's lawful occupation."

It was assumed in *Russell* that the action of the union constituted a violation of 9(b)(1)(A).

The Court, in rendering its opinions in *Laburnum* and *Russell*, found Congressional intent not to be implied in pre-empting state jurisdiction of actions involving common law torts, the Court recognizing that it was the intent of Congress, by the establishment of the unfair labor practices against union conduct, merely to remove from the protected area of the Act activities which Congress had determined as illegal. The Court thus recognizes that Congress did not intend to deny existing rights under state law, thereby removing rights already granted individuals under common law. This holding of the Court was succinctly stated in *Laburnum* when the Court said (at pp. 663, 664):

> "Here Congress has neither provided nor suggested any substitute for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery would deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct."

It is just such an unfair and unjust result as denied by the Court in *Laburnum* and *Russell* which the union here seeks. There is no question in this case but that the conduct of the union, being willful and malicious in wrongfully interfering with Borden's inherent right to work and making threats to Borden, constituted a tort under Texas law. No issue is here raised by the union that its conduct was not wrongful and tortious, the sole issue submitted being that

the conduct, being arguably an unfair labor practice, although a breach of contract and a tort, is pre-empted by the Federal Act. The result which the union seeks here is a grant of immunity from its wrongful conduct as a right under the Federal Act, and the enunciation of a legal principle which will assure others who engage in such conduct, either immunity or at least escape from the full consequences of their action.

C. Matters Here Involved Are No More Than of Peripheral Concern to the Act.

Again assuming, arguendo, that the conduct here involved constitutes an unfair labor practice, it is of minor importance to the Federal regulatory scheme. The Court recognized or assumed an unfair labor practice to be involved in *United Construction Workers, Affiliated with United Mine Workers of America, et al.* v. *Laburnum Construction Co.*, 347 U.S. 656; *United Automobile Workers* v. *Russell*, 356 U.S. 634; and *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

However, in each such case the Court held that, although the conduct there may have come within the jurisdiction of the National Labor Relations Board, the activities there involved were not such as were exclusively within the jurisdiction of that administrative body.

As the Court recognized in *Laburnum*, the Labor Management Relations Act of 1947 primarily sought to *prevent* unfair labor practices and industrial strife. One of the principal themes of the pre-emption doctrine is to avoid conflicting decisions by the state or federal courts on the one hand and the Labor Board on the other, as to whether conduct which was viewed by one forum as legal might in another forum be held illegal.

"Our cases which hold that state jurisdiction is pre-empted are distinguishable. In them we have been concerned lest one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Acts." *International Union, etc.* v. *Russell*, 356 U.S. at p. 644.

Clearly a protected activity, as declared by Congress, would be of central concern to the Act. Further, those unfair labor practices prohibited by the Act, for which traditional state remedy is provided, would also be of primary concern to the Act. Where the state has assumed jurisdiction of activities which reasonably come within the protected and concerted activities allowed by Congress, the Court has found state jurisdiction to be pre-empted. *United Automobile Workers* v. *Russell*, 356 U.S. 634; *Local 111, United Electrical Workers* v. *Laburnum Construction Co.*, 347 U.S. 656; *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

Certainly a different case is presented where there is no possibility that the state courts and the Board may conflict in deciding whether or not the conduct is legal and permitted by the Act. In these cases where a state court has assumed jurisdiction to award full redress for past conduct amounting to a breach of contract or the commission of a tort it has been held that mere coincidence between the facts giving rise to the state court proceeding and a possible action before the National Labor Relations Board is not so compelling under the Act as to deny state jurisdiction and full redress to the injured party. In such an event the court in *Gonzales* held (at p. 621):

"If, as we held in the Laburnum case, certain state causes of action sounding in tort are not displaced

simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not to be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member."

One of the principal concerns of the Court in finding state jurisdiction not to be pre-empted in such cases has been to carry out the true intent of Congress in promoting justice and democracy and to prevent tortured implications of the Act to deny individual justice.

The Act did not establish a general scheme of allowance of full damages for injuries caused by past wrongful conduct, be it in tort or in contract. *United Automobile Workers* v. *Russell*, 356 U.S. 634; and *United Construction Workers, Affiliated with United Mine Workers of America, et al.* v. *Laburnum Construction Co.*, 347 U.S. 656. In examining Sec. 19(c) of the Act, which includes the authority of the Board to award back pay, the Court in *Russell* held that the grant of authority of the Board therein contained was not exclusive and said (at p. 642):

"This section is far from being an express grant of exclusive jurisdiction superseding common law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union.

> To make an award, the Board must first be convinced that the award would 'effectuate the policies' of the Act. 'The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act.' Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 198, 61 S.Ct. 845, 854."

Again in *Gonzales* the Court held (at p. 621):

> "The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct any damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of valuable state remedies for all damages suffered. International Union, United Automobile Workers v. Russell, 356 U.S. 634, 78 S.Ct. 932."

It is our view that the application of the pre-emption doctrine to a case involving conduct such as suffered by Borden would grant substantial immunity to labor unions for their wrongful conduct cutting off the right of full redress provided under traditional law principles and substituting therefor the mere possibility of a partial relief by an administrative body looking not to the individual and his damages but to the administration of a Federal Act which is only incidentally concerned.

III.

Examination of Gonzales and Garmon in Light of Labor Management Disclosure Act of 1959.

At the outset we submit that *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, has been misinterpreted by the union. *Garmon*, it would appear, is merely a recognition and clarification of the doctrine first enunciated in *Garner, et al.* v. *Teamsters, etc.*, 346 U.S. 485. The activity in issue in *Garner* was potentially protected under the Act but prohibited by state law. The Court, finding that a conflict in remedies existed in the event that both the State and the NLRB found the activity condemned, could issue the same relief. In declining to decide whether or not the activity was protected or prohibited the Court declared the duty of primary decision lies with the Board.

Then in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, a peaceful picketing case also, the Court in reaffirming the *Garner* doctrine held (at p. 480):

> "Obvious conflict, actual or potential, leads to easy judicial exclusion to state action."

There the complaint had alleged unfair labor practices and it was clear that the activity complained of was within the central theme of the Act and the Court stated (348 U.S. at p. 481):

> "*But where the moving party itself alleges unfair labor practices,* where the facts *reasonably* bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be *reasonably* deemed to come within the protection afforded by that Act, the state court

must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." (Emphasis added.)

Then in *Garmon* the *Garner-Weber* doctrine was reaffirmed in a case again involving peaceful picketing, the Court stating (at page 244):

> "*When it is clear or may fairly be assumed* that the activities which a state purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield." (Emphasis added.)

and further when the Court stated (at p. 245):

> "When an activity is arguably subject to §7 or §8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . "

It is the last word "arguably" on which the union seizes, interpreting *Garmon* to mean that if it can be argued at all that an activity was protected or prohibited (without regard as to whether the argument be reasonable or not), then state jurisdiction must be pre-empted. Such an interpretation could hardly be justifiable when viewing the previous rulings of the Court and, indeed, other language in *Garmon*, and it is particularly significant that in *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, at p. 617, the Court dismissed illogical argument in inferring activities under the Act when it was held:

> "Since we are dealing with implications to be drawn from the Taft-Hartley Act for the evidence of conflicts between enforcement of federal policy by the National

> Labor Relations Board and the exertion of state power, it might be abstractly justifiable, as a matter of *wooden logic*, to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded." (Emphasis added.)

Any lingering doubts as to the intention of the Court in *Garmon* when proclaiming that activities "arguably" subject to the Act are pre-empted have been resolved by the Court in *Marine Engineers Beneficial Association, et al.* v. *Interlake Steamship Co.*, 370 U.S. 173, at p. 182, wherein the Court said that state courts could cede jurisdiction in a case in which pre-emption has been raised:

> "whenever a *reasonably* arguable case is made to that effect." (Emphasis added.)

The union argues that *Gonzales* must be re-examined in the light of the *Garmon* case. Here the contention is that the court in its holding in *Garmon* has in effect overruled the rationale of *Gonzales*. Only a cursory examination of the opinion in *Garmon* shows that the Court specifically upheld its previous holding in that case. Then the union would contend that, although the doctrine that state courts have jurisdiction of matters of peripheral concern to the Act, such matters should be referred to the Labor Board in the first instance. It is apparent that learned counsel here misses the underlying and supporting foundation of that holding. The Court assumed in *Gonzales*, as well as in *Laburnum* and *Russell*, that the matters there involved were within the jurisdiction of the Board, but held that the matter was not within the *exclusive* jurisdiction of that administrative agency, the theory behind this doctrine being that when matters were of great concern to the states, or of peripheral concern to the Act, there was no basis for implying exclusive jurisdiction. If the union agrees that the

Gonzales case is sound in its rationale that matters of peripheral concern should come within the jurisdiction of the state courts, what possible object could be achieved by first referring these matters to the Labor Board for a determination? In matters of peripheral concern to the Act the Court recognizes, in *Gonzales*, that to deny state jurisdiction in favor of the Labor Board would, in effect, grant the wrongdoer a right not intended by Congress to escape the full consequence of such wrongful conduct under state law.

Assuming a matter to be of peripheral concern to the Act, does the union suggest that in referring such matters to the Labor Board it has expertise in traditional concepts of contract and tort law and its application in all fifty states? The Labor Board is not presumed to have expertise except in the labor field. To suggest that matters of peripheral concern to the Act be first referred to the Board is to suggest that the body of common law of all fifty states be submitted to that administrative agency. It can hardly be argued that Congress intended such an incredible result.

Further it is submitted that *Garmon* should be reexamined in the light of Congressional intent, as expressed in the Labor-Management Reporting and Disclosure Act of 1959. A "No-Man's Land" was created in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. In that case it was determined that the Congressional intent to provide centralized administration in the Labor Management Act of 1947 was so compelling that states must decline jurisdiction in matters under the Act even though the Board had refused to act. The holding in *Garmon* was in a large sense based upon *Guss*.

Congress has shown in the 1959 Act that its past intent and certainly its present intent is that centralized ad-

ministration of labor relations is not of such paramount importance as to deny individual rights and remedies provided by state law. In Sec. 701 of the Act of 1959 Congress, 73 Stat. 519, 29 U.S.C. 401, *et seq.*, ceded to state and federal tribunals those matters beneath the monetary jurisdictional standards of the Board. Further, in Sec. 103 and Sec. 603 of the Act, Congress specifically recognized and approved the jurisdiction of state courts to grant relief from wrongful conduct.

Although certainly centralized administration of labor relations has been maintained, it is submitted that the presently expressed intent of Congress is that it shall not be of such overwhelming significance that wrongful conduct may not be dealt with by state courts under state laws. Thus, *Garmon* should be examined in light of this later Congressional intent.

Conclusions

Where a suit is solely against a union in the state court by a member of that union seeking redress for wrongs committed against him in violation of state law, no unfair labor practice should be inferred. Where the union member has no complaint against the employer and there is no showing that the union caused, or attempted to cause, the employer to discriminate, no inference of an unfair labor practice can be drawn.

The Federal Acts are concerned in the main sense in preventing unfair labor practices and industrial strife. To pre-empt the jurisdiction of the state courts in a suit involving purely the state law, not aimed in any sense at the regulation of labor-management relations, would cause unjust and harsh results. Although the sweep of the Federal law is broad, it is not all inclusive and, where matters

are of peripheral concern to the main purposes of the Federal law, compelling state interests and individual rights should not be denied.

Congress did not intend the labor Acts to operate in such a manner as to preclude state courts and grant to an administrative agency control over contract and tort law of the various states. Surely a more compelling Congressional intent than has been heretofore expressed by Congress would be necessary before arrival at such an incongruous result.

It is respectfully submitted that the judgment of the Court below should in all respects be affirmed.

Respectfully submitted,

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APPENDIX

The relevant portions of the Labor Management Relations Act, of 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*), are as follows:

• • • • •

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

• • • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representatives of the employees as provided in

section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure

to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by an action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).

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PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be

amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue al-

leging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

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The relevant portions of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401 *et seq.*) are as follows:

§ 103. Retention of existing rights

Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

§ 603. Retention of rights under other federal and state laws

(a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

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§ 701. Federal-state jurisdiction

(a) Section 14 of the National Labor Relations Act, as amended,[25] is amended by adding at the end thereof the following new subsection:

"(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category

of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

"(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

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The relevant Texas Statutes are:

"Art. 5207a. Right to bargain freely not to be denied; membership in labor union:

"Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

"Sec. 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

"Sec. 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to

any new agreement or contract executed after the effective date of this Act.

"Sec. 4. Definitions. By the term 'labor union' as used in this Act shall mean every association, group, union, lodge, local, branch or subordinate organization of any union of working men, incorporated or unincorporated, organized and existing for the purpose of protecting themselves and improving their working conditions, wages or employment relationships in any manner, but shall not include associations or organizations not commonly regarded as labor unions.

"Sec. 5. If any clause, sentence, paragraph or part of this Act, or the application thereof to any person or circumstances, shall for any reason be adjudged to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act and the application thereof, but shall be confined in its operation to the portion of the Act directly involved in the controversy in which judgment shall have been rendered and to the person or circumstances involved. Acts 1947, 50th Leg., p. 107, ch. 74."

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Art. 5154g, R.C.S.

Section 1. It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

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